

Independent Insurance Agents of America, Inc. v. Ludwig and Variable Annuity Life Insurance Co. v. Clarke: The Banking-Insurance War in Search of a Judicial Truce

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"The war drums are beating in the insurance industry camp once again, and the banking industry is circling its wagons."¹

I. INTRODUCTION

The twenty-five-year-old war² between the banking and insurance industries over bank insurance powers has recently culminated in courtroom confrontations in the Fifth and the District of Columbia Circuit Courts of Appeals. These judicial battles, initiated by the insurance industry to fend off incursions by banks into insurance markets, draw into question two statutory provisions granting limited insurance powers to national banks: the small-town bank insurance powers provision³ and the incidental banking powers provision.⁴ These provisions have been interpreted broadly by the Office of the Comptroller of the Currency (OCC)⁵ in favor of greater bank involvement in the sale of insurance. The insurance industry challenges the OCC's position as violating the expressed intent of Congress. The banking industry counters with the claim that the statutes are ambiguous and thus subject to reasonable interpretation by the OCC, pursuant to guidelines established by the Supreme Court of the United States.

In deciding whether the banking or insurance position should prevail, courts have had to determine whether Congress's intent is clear from the language of the provisions or whether it is sufficiently ambiguous to warrant deference to the findings of the OCC.⁶ The D.C. Circuit and the Fifth Circuit

¹ Philip C. Meyer, *Banks Gird for New Fight in Congress over Insurance Powers*, BANKING POL'Y REP., Sept. 6, 1993, at 5, 5.

² The beginning of this modern day debate was sparked by the decision of the Fifth Circuit Court of Appeals in *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968).

³ 12 U.S.C. § 92 (Supp. V 1993).

⁴ 12 U.S.C. § 24(seventh) (1988 & Supp. V 1993).

⁵ The Office of the Comptroller of the Currency was established in 1913 as a bureau under the auspices of the Department of the Treasury for the purpose of administering laws passed by Congress concerning national banks. See 12 U.S.C. § 1 (1988).

⁶ In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

recently reached different conclusions, causing both industries to set their sights on the Supreme Court for a final judicial resolution. In *Independent Insurance Agents of America, Inc. v. Ludwig*,⁷ the D.C. Circuit upheld a ruling by the Comptroller of the Currency permitting a national bank to sell general insurance products nationwide from a branch office located in a small town. In *Variable Annuity Life Insurance Co. v. Clarke*⁸ (*VALIC*), the Fifth Circuit held that national banks could sell insurance products only in small towns. There had been conflicting speculation as to whether the nation's highest court would get to hear these cases, but on June 6, 1994 the Court decided to review the Fifth Circuit case.⁹ However, its decision will not likely spell the end of this debate. Instead, we can expect the war to rage on in a different theater—Congress.

The purpose of this Note is to explore the status of the bank insurance powers debate as illustrated by the recent decisions of the D.C. Circuit in *Independent Insurance Agents* and the Fifth Circuit in *VALIC*. In an attempt to provide a thorough account of the issues involved in this debate, Part II of this Note explores the past and present role of Congress in the conflict. Part III analyzes the judicial treatment of the statutory provisions in dispute in *Independent Insurance Agents* and *VALIC*. Parts IV and V analyze the judicial resolution of these cases and present the view that Congress's intent can be inferred from its passivity to mean contentment with the status quo. This conclusion is used to support the proposition that deference should be paid to the Comptroller's decisions to expand bank insurance powers.

842-43 (1984), the Supreme Court outlined a two-step analysis to be used by courts in reviewing an administrative agency's statutory interpretation. The first question is always whether Congress has directly spoken to the precise issue. If Congress's intent is clear, there can be no controversy because the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. "If, however, the court determines . . . [that] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

⁷ 997 F.2d 958 (D.C. Cir. 1993).

⁸ 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom. Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994).

⁹ *VALIC*, 114 S. Ct. at 2161.

II. THE LEGISLATIVE FRONT

A. *Exposition of Laws Affecting Bank Insurance Powers*

Because bank powers derive only from statute,¹⁰ it is first necessary to outline some of the existing laws concerning bank insurance powers, as well as the policy considerations underlying their enactment. Consequently, courts must look at the statutory language and legislative history to assess Congress's intent in order to review regulatory actions. It is clear from the courts' analysis of the small-town exception, 12 U.S.C. § 92,¹¹ that there are few bright lines in discerning congressional intent.¹²

The principal objectives of banking regulation traditionally have focused on the safety and soundness of individual banks and the stability of the financial system as a whole.¹³ Congress gave effect to these objectives when it passed the Banking Act of 1933,¹⁴ four sections of which are referred to as the Glass-Steagall Act,¹⁵ to control risks. The goals of the Glass-Steagall Act are the maintenance of general economic stability by prohibiting unsound and imprudent investments, and the prevention of potential conflicts of interest between commercial and investment banking operations.¹⁶ One of the goals of the legislators was to ensure that banks act as impartial fiduciaries.¹⁷ Recent events, such as the stock market crash of October 19, 1987 and the savings and loans crisis, have served to reinforce the belief that safety and soundness are

¹⁰ See *California Bank v. Kennedy*, 167 U.S. 362, 366 (1897); *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67, 73 (1891).

¹¹ 12 U.S.C. § 92 (Supp. V 1993).

¹² Analytical treatment of the existing laws that relate to bank insurance powers, including the small-town exception, is reserved for Part IV.

¹³ Edward L. Symons, Jr., *The United States Banking System*, 19 BROOK. J. INT'L L. 1, 25 (1993).

¹⁴ Banking Act of 1933, ch. 89, 48 Stat. 162.

¹⁵ *Id.* §§ 16, 20, 21, 32, 48 Stat. 162, 184, 188, 189, 194 (codified as amended at, respectively, 12 U.S.C. §§ 24, 377, 378, 78 (1988 & Supp. V 1993)). Glass-Steagall (1) prohibits national banks from buying or selling securities for their own account, § 16, 48 Stat. at 184; (2) restricts national banks from investing in debt securities, § 20, 48 Stat. at 188; (3) bans national banks from underwriting or issuing securities, with exceptions, § 21, 48 Stat. at 189; and (4) prohibits national banks from affiliating with investment banking firms, § 32, 48 Stat. at 194.

¹⁶ Matthew Clark & Anthony Saunders, *Judicial Interpretation of Glass-Steagall: The Need for Legislative Action*, 97 BANKING L.J. 721, 725 (1980).

¹⁷ Emeric Fischer, *Banking and Insurance—Should Ever the Twain Meet?*, 71 NEB. L. REV. 726, 739 (1992).

best accomplished by extensive risk control regulation.¹⁸

Bank insurance activities, like securities activities, in recent decades have been the subject of congressional action and extensive administrative determinations. Any query regarding insurance must begin with a survey of the statutes. Neither the National Bank Act of 1864¹⁹ nor subsequent banking acts specifically prohibited banks from engaging in the sale of insurance; nonetheless it was historically accepted that national banks did not have the power to sell or underwrite insurance.²⁰ This view was apparently confirmed by the passage of the 1916 amendment²¹ to the Federal Reserve Act,²² in which Congress added the small-town exception to allow national banks in communities of 5000 people or fewer to sell any insurance, but not to underwrite insurance.

At the time these regulatory provisions were passed, they were not tested extensively by the banking industry because the conduct of traditional banking functions (*i.e.*, private and commercial lending) presented a good return with

¹⁸ See Barry A. Abbott et al., *Banks and Insurance: An Update*, 43 BUS. LAW. 1005, 1006 (1988).

¹⁹ National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended at 12 U.S.C. § 38 (1988)).

²⁰ Fischer, *supra* note 17, at 746.

²¹ Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753, *amended by* Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 403(b), 96 Stat. 1469, 1511.

In addition to the powers now [Sept. 7, 1916] vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees between the said association and the insurance company for which it may act as agent: *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92 (Supp. V 1993) (first emphasis added).

²² Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.). See also *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2185 (1993).

relatively low risk.²³ Thus, there was no pressing need for expansion by banks into other areas. But since the late 1960s, the financial markets have undergone a major revolution.²⁴ Finance companies and automobile finance companies have displaced commercial banks as the major providers of installment credit, pension and retirement plans have diverted vast pools of funds away from banks to the securities markets, and prime corporate customers are increasingly side-stepping banks by satisfying their short- and intermediate-term credit needs by issuing commercial paper.²⁵ The net effect for banks has been the loss of their dominance in commercial intermediation²⁶ and, thus, a loss in profitability and viability.

1. Section 1843(c)(8): The Bank Holding Company Act Provision

The banks' response to the increasing competition was an attempt to bypass statutory limitations on their banking activities by forming bank holding companies (BHCs).²⁷ The Banking Act of 1933 contained some controls on BHCs,²⁸ but it was not until 1956, with the enactment of the Bank Holding Company Act (BHCA),²⁹ that Congress decided to comprehensively regulate the acquisition of nonbanking affiliates by BHCs.³⁰ Because of concerns about the concentration of banking resources in other financial fields, Congress placed a prohibition on BHCs and their nonbank subsidiaries against activities of a nonbank nature, except those "of a financial, fiduciary, or insurance nature . . . which the Board . . . has determined to be so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto."³¹ This language was interpreted by the Federal Reserve to allow a variety of insurance activities by BHC subsidiaries, including selling

²³ Fischer, *supra* note 17, at 771-75.

²⁴ *Id.*; see also Jonathan R. Macy, *The Inevitability of Universal Banking*, 19 BROOK. J. INT'L L. 203, 206 (1993).

²⁵ Fischer, *supra* note 17, at 771-75.

²⁶ *Id.* at 775.

²⁷ A bank holding company is an entity that controls one or more banks. THOMAS P. FITCH, *DICTIONARY OF BANKING TERMS* (Irwin Kellner et al. eds., 1990).

²⁸ Under the Banking Act of 1933, all BHCs that were members of the Federal Reserve were placed under federal supervision. Banking Act of 1933, ch. 89, § 19(e), 48 Stat. 162, 188, *repealed in relevant part by* Banking Act of 1966, July 1, 1966, Pub. L. No. 89-485, § 13(c), 80 Stat. 236, 242.

²⁹ Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-50 (1988 & Supp. V 1993)).

³⁰ See Fischer, *supra* note 17, at 776.

³¹ Bank Holding Company Act § 4(c)(6), 70 Stat. at 137 (codified as amended at 12 U.S.C. § 1843(c)(8) (1988)).

credit life, accident, and health insurance, as well as property and casualty insurance when bundled with other credit insurance related to loans.³²

The BHCA was amended in 1982 by the Garn-St Germain Act,³³ which provided that "it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal, agent, or broker except" as permitted in exemptions A-G of the statute.³⁴ The insurance industry achieved by way of this amendment a major legislative victory, which was hailed as limiting BHC incursions into insurance activities. The consequence of this provision was to remove some of the underwriting and sale of insurance from the list of insurance products sold by BHCs as activities generally considered closely related to banking.³⁵

Congress provided seven exemptions from the BHCA's insurance prohibition in certain situations.³⁶ Three of these exemptions permit qualified BHCs to act as or own insurance agencies,³⁷ provided that the BHC intending to sell insurance or acquire an insurance agency prove to the Board (1) that an exemption applies, and (2) that the public benefits from the insurance operation under consideration will outweigh any detrimental effects.³⁸ The exemption that is of particular concern in this Note is the exemption in 12 U.S.C. § 1843(c)(8)(C). This provision allows BHCs or their nonbank subsidiaries in towns with populations less than 5000 or in places that have "inadequate insurance agency facilities" to operate insurance agencies.³⁹ The Federal

³² Symons, *supra* note 13, at 34.

³³ Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, Title VI, 96 Stat. 1469 (amending 12 U.S.C. § 1843(c)(8)).

³⁴ *Id.* at 1536.

³⁵ Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public That Regulators Have Ignored*, 44 Sw. L.J. 905, 914-15 (1990). Two exemptions to the BHCA's insurance prohibition are grandfather clauses. 12 U.S.C. §§ 1843(c)(8)(D), (G) (1988).

³⁶ See 12 U.S.C. § 1843(c)(8) (1988).

³⁷ These exemptions are §§ 1843(c)(8)(C), (F), and (G).

³⁸ Palomar, *supra* note 35, at 914; see also 12 U.S.C. § 1843(c)(8)(G) (1988).

In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

Id.

³⁹ 12 U.S.C. § 1843(c)(8)(C) (1988).

Reserve⁴⁰ has interpreted this provision to permit the sale of insurance in towns of 5000 people or fewer if the BHC has a lending subsidiary in the town and the insurance activities are conducted *only* in that town and the surrounding area.⁴¹ This decision placed the Federal Reserve at odds with the Comptroller of the Currency, which interpreted the small-town bank insurance powers provision, 12 U.S.C. § 92, to permit the *nationwide* sale of insurance products by national banks located in communities of 5000 or fewer inhabitants.

2. Section 92: The Small-Town Bank Insurance Powers Provision

Pursuant to 12 U.S.C. § 92, the Comptroller in 1963 granted national banks located in large cities the power to sell insurance in towns of 5000 or fewer if the bank has a branch in the small town.⁴² This power was extended in 1986 by a ruling of the Comptroller allowing small-town banks to sell insurance outside of the community in which they are located.⁴³ As a result, the Comptroller of the Currency on several occasions has authorized insurance activities by national banks that the Federal Reserve has denied to BHCs.⁴⁴

Section 92 has been the subject of much litigation in recent years. The questions raised range from the scope of the activities it covers⁴⁵ to the

⁴⁰ BHCs are regulated by the Federal Reserve Board. 12 U.S.C. § 1842(a)-(c) (1988 & Supp. V 1993).

⁴¹ 12 C.F.R. § 225.25(b)(8)(iii) (1994).

⁴² 12 C.F.R. § 7.7100 (1993). This ruling was originally published in 1963. *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1012 (5th Cir. 1968); see Roman J. Gerber, *Current Legal and Regulatory Developments*, 1 NAT'L BANKING REV. 133, 137 (1963). Thereafter it was carried as ¶ 7100 of the *Comptroller's Manual for National Banks* until it was codified in the Code of Federal Regulations in 1971.

⁴³ OCC Interpretive Letter No. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

⁴⁴ Symons, *supra* note 13, at 34-35.

⁴⁵ Questions of scope under § 92 are inherently tied to the incidental banking powers provision under § 24(seventh). See *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295, 1301 (5th Cir. 1993) (finding annuities to be insurance and thus subject to § 92), *cert. granted sub nom. Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994); *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 156-57 (2d Cir. 1992) (holding title insurance to fall under the explicit language of § 92, which trumps the more general authority of § 24(seventh)), *cert. denied*, 112 S. Ct. 2959 (1993); *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979) (finding credit insurance to be incidental to the business of banking under § 24(seventh) and thus not subject to § 92), *cert. denied*, 449 U.S. 823 (1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968) (finding incidental insurance powers to be controlled by § 92).

geographic boundaries it prescribes⁴⁶ to whether the provision even exists at all.⁴⁷ The legislative history of section 92 provides little guidance for resolving these issues. On the issue of geographic boundaries, the Fifth Circuit determined in 1968 in *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*⁴⁸ that the legislative history of section 92 clearly indicated that Congress intended to limit the sale of insurance by national banks located in communities of 5000 or fewer to the boundaries of that community.⁴⁹ Both the Second Circuit in *American Land Title Ass'n v. Clarke*⁵⁰ and the Fifth Circuit in *VALIC*⁵¹ recently revitalized the *Saxon* court's interpretation. In contrast, the D.C. Circuit held in 1993 in *Independent Insurance Agents of America, Inc. v. Ludwig* that nothing in the history of section 92 suggested "an unambiguous congressional intent" to restrict the geographical scope of activities conducted by banks in small towns.⁵²

3. Section 24(seventh): The Incidental Banking Powers Provision

On the issue of product expansion, or scope, 12 U.S.C. § 24(seventh) has played an influential role in the interpretation of section 92. Section 24(seventh) grants to national banks "all such incidental powers as shall be necessary to carry on the business of banking."⁵³ However, "[w]hat constitutes the

⁴⁶ See *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 958 (D.C. Cir. 1993).

⁴⁷ *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2179-86 (1993). Because of conflicting courts of appeals decisions regarding the existence of § 92, the Supreme Court granted review to determine whether the provision had been repealed in 1918 by an amendment to the Federal Reserve Act, under which it was originally enacted in 1916. Justice Souter, writing for the Court, upheld the validity of § 92 as part of the Act that was to be preserved, not amended, in 1918. *Id.* at 2186.

⁴⁸ 399 F.2d 1010 (5th Cir. 1968). This case arose as a result of the 1963 OCC Ruling No. 7110, which provided, "Incidental to the powers vested in them under 12 U.S.C. sections 24, 84, and 371, National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions" *Id.* at 1012 (quoting OCC Ruling No. 7110 (1963)). The question presented in this case was whether 12 U.S.C. § 92 impliedly prohibited national banks from carrying on the business of insurance agents in places of more than 5000 persons. *Id.* at 1012-13. The court held that it did. *Id.* at 1012.

⁴⁹ *Id.* at 1018.

⁵⁰ 968 F.2d 150, 155 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

⁵¹ *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295, 1303 (5th Cir. 1993), *cert. granted sub nom. Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994).

⁵² *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993).

⁵³ 12 U.S.C. § 24(seventh) (1988 & Supp. V 1993).

'business of banking' for purposes of Section 24(Seventh) is not statutorily defined."⁵⁴ Instead, its interpretation has been left to the Comptroller and the courts.⁵⁵ The Comptroller has traditionally read section 24(seventh) broadly to allow national banks to adapt to changes in the banking field. This flexible approach has resulted in OCC rulings permitting national banks to engage in credit life insurance,⁵⁶ title insurance,⁵⁷ and annuities sales⁵⁸ as incidental to the business of banking. Of these attempted bank product expansions, only the sale of credit life insurance has been upheld by the courts.⁵⁹ Although the Comptroller's rulings have not always been upheld by the courts, the courts have recognized changes in the business of banking when interpreting national bank insurance powers.⁶⁰ But as far as the banking industry is concerned, mere recognition is not enough.

4. State Legislation

Because of the difficulties banks faced in gaining federal approval of additional insurance powers, banking organizations turned their attention to state legislation.⁶¹ Using the language of the Garn-St Germain amendments to 12 U.S.C. § 1843,⁶² which limited insurance activity by BHCs, the banking industry sought to engage in insurance activities through bank subsidiaries to the extent permitted by the National Bank Act or the applicable state laws.⁶³

⁵⁴ Melanie L. Fein, *Despite Court Ruling, National Bank Annuity Powers Are Still Broad*, BANKING POL'Y REP., Oct. 18, 1993, at 4, 4.

⁵⁵ *Id.*

⁵⁶ See *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979) (holding credit life insurance to be incidental to the business of banking and thus a proper exercise of bank insurance powers pursuant to § 24(seventh)), *cert. denied*, 449 U.S. 823 (1980).

⁵⁷ See *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 157 (2d Cir. 1992) (not reaching question of whether or not title insurance is incidental to the business of banking), *cert. denied*, 113 S. Ct. 2959 (1993). This court criticized the *Heimann* ruling for "its scant analysis of section 92 and its failure to discuss the provision's legislative history." *Id.*

⁵⁸ See *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295 (5th Cir. 1993) (finding annuities sales not to be necessary to the business of banking under § 24(seventh) and thus subject to the geographic restrictions of § 92), *cert. granted sub nom. Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994).

⁵⁹ See *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

⁶⁰ See Fein, *supra* note 54, at 4.

⁶¹ Symons, *supra* note 13, at 35.

⁶² See *supra* notes 33-34.

⁶³ Fischer, *supra* note 17, at 798.

The Code of Federal Regulations contains a regulation promulgated in 1971 that permits BHC subsidiary state banks to own any subsidiaries allowed by state law.⁶⁴ Consequently, in those states where state-chartered banks and their subsidiaries are authorized under state law to act as insurance agents, bank subsidiaries of BHCs can engage in broader insurance activities than otherwise permitted under federal law.⁶⁵ Recent legal challenges in several states have questioned the ability of state law to be *either* more or less restrictive than national legislation.⁶⁶ However, there has been no definitive resolution of this issue.

B. *Competing Interests*

The *Owensboro National Bank* case cited in the previous footnote is just one outgrowth of the bank insurance powers dispute, but it is illustrative of the many federal bank insurance lawsuits pending today. To summarize the situation: banks are seeking to diversify into insurance markets; the insurance industry responds by lobbying Congress for protective legislation; banks then find loopholes in order to continue insurance activities; and the insurance industry returns to Congress, demanding that the gaps be closed. Congress has generally been very responsive to the industry's requests and has consistently increased the limits on banks and BHCs entering into the insurance business.⁶⁷ It has done so under the guise of concern about safety and soundness principles.⁶⁸ A review of these purported policy objectives is necessary in light of the changes in banking technology and changing consumer needs. With increasing consumer demand for the whole range of financial services to be offered under one roof, many bankers are convinced that continued profitability will come only if banks are permitted to expand into areas from which they

⁶⁴ 12 C.F.R. § 225.22(d)(2)(ii) (1994). This provision applies to operating subsidiaries of holding company-owned state banks.

⁶⁵ Symons, *supra* note 13, at 35.

⁶⁶ See, e.g., *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24 (E.D. Ky. 1992). *Owensboro National Bank* involved three national bank subsidiaries of a holding company seeking to enjoin the Kentucky Insurance Commissioner from prohibiting them from conducting general insurance agency functions in small towns pursuant to 12 U.S.C. § 92. The state law was *more* restrictive than the national legislation. See also Richard M. Whiting, *It's Time for a Truce in War over Bank Insurance Powers*, BANKING POL'Y REP., Aug. 2, 1993, at 1, 14; Jeffrey Marshall, *The Showdown over Bank Insurance Sales*, U.S. BANKER, Apr. 1994, at 50.

⁶⁷ Symons, *supra* note 13, at 36.

⁶⁸ *Id.*

have traditionally been restricted: securities, real estate, and insurance.⁶⁹

While all three fields are potentially lucrative, insurance presents the easiest area of penetration with the best likelihood of success for both small and large institutions.⁷⁰ Banks have the assets essential for success in the insurance business: credibility with consumers, a convenient delivery system, and acknowledged expertise in computer and payment systems.⁷¹ Bankers argue that they can provide insurance services more efficiently than traditional insurance agents and without increased risk to the consumer.⁷² Insurance agents vehemently oppose such bank expansion because of concerns about competition and bankers' inexperience and lack of knowledge about the insurance business.⁷³

The deciding forces in this debate are Congress and the federal regulators who, as illustrated in the foregoing discussion, have come out on the side of the insurance industry out of fear for the "safety and soundness" of bank insurance involvement, especially insurance underwriting.⁷⁴ But despite the emergence of federal regulators as allies of the insurance agents, the banking industry has found a friend in the Office of the Comptroller of the Currency. Favorable rulings by the OCC have served to open doors for banks wishing to engage in insurance activities. However, conflicting judicial treatment of these rulings has prompted both industries to turn their efforts toward Congress while they await final judicial resolution by the Supreme Court.

C. Recent Congressional Activity

Senator Christopher J. Dodd,⁷⁵ "a frequent ally of the insurance industry in its [twenty-five year] war over bank insurance powers," has spearheaded the

⁶⁹ Abbott et al., *supra* note 18, at 1005.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See generally id.*

⁷³ *Id.* at 1005.

⁷⁴ *Id.* When banks serve as insurance agents, they are merely selling insurance products guaranteed by an insurance principal. When banks underwrite insurance products, however, they assume any risk as the insurer of the product. This gives rise to the use of banks' funds to guarantee the financial support of the insurance product. When this occurs, the potential for cross-contamination of the banking and insurance interests becomes great. The assumption of a bad risk in either area is likely to affect the stability of the other. As a result, Congress has enacted laws (e.g., the Glass-Steagall Act of 1933) prohibiting any underwriting of insurance by banks in order to prevent the type of systemic collapse of the financial sector that occurred in 1929. *See generally* Symons, *supra* note 13.

⁷⁵ Senator Dodd is a Democrat from Connecticut, capital of the insurance industry.

industry's latest push for a rollback of banks' powers.⁷⁶ Dodd, a member of the Senate Banking Committee, proposed an amendment to a bill under the Committee's consideration in the fall of 1993, which would repeal section 92. The effect of this amendment would be to eliminate the small-town insurance sales of national banks and to preclude any authority of the Comptroller to grant new insurance powers as "incidental to banking."⁷⁷ This legislation was tabled until the 1994 legislative session because of a failure to muster a quorum for a vote.⁷⁸ The absence of so many of the panel's members reflects the members' uneasiness about voting on such a controversial issue. In many respects, the failed vote is an indication that the legislators, like the courts, are unable to resolve their differences on the issues.

The 1994 legislative session has seen even less activity with regard to bank insurance powers than did the 1993 session. This is due in large part to the withdrawal by Senator Dodd of his proposal.⁷⁹ Senator Dodd's decision was influenced by the four-judge dissent in the Fifth Circuit's denial of rehearing in the *VALIC* case.⁸⁰ The strong dissent and the Justice Department's desire to appeal the case led Senator Dodd to step back and hope that the Supreme Court will clarify the status of sections 24(seventh) and 92.⁸¹

D. Summary

The statutory provisions concerning insurance powers of national banks and BHCs⁸² reflect the belief that allowing banks to diversify their activities

⁷⁶ Meyer, *supra* note 1, at 5; see *Revised Senate Bank Insurance Powers and Interstate Branching Bill Could Move*, BNA BANKING DAILY, Oct. 6, 1993, available in LEXIS, BNA Library, BNABD File; see also Robert M. Garsson, *Vote on Curbing Insurance Power Stalled by Absence of Senators*, AM. BANKER, Nov. 19, 1993, at 2.

⁷⁷ Garsson, *supra* note 76; see also 12 U.S.C. § 24(seventh) (granting national banks the power to "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking"). 12 U.S.C. § 92 currently grants national banks the limited power to act as insurance agents. Without this authority, national banks would be unable to provide insurance services. Therefore, if insurance powers are no longer part of the business of banking, then they can also not be "incidental to the business of banking" under 12 U.S.C. § 24(seventh).

⁷⁸ Garsson, *supra* note 76. A quorum is 10 of the panel's 19 members.

⁷⁹ *Dodd Decision on Bill Helps Banks*, BANKING ATT'Y, Feb. 14, 1994, at 7, 7.

⁸⁰ *Id.*; see *Variable Annuity Life Ins. Co. v. Clark* [sic], 13 F.3d 833 (5th Cir. 1994), denying reh'g to 998 F.2d 1295 (1993), cert. granted sub nom. *Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994).

⁸¹ *Id.*; see also *Decision Has Risk for Bankers: SG To Back Banks, OCC in Seeking Valic Review*, BANKING ATT'Y, Apr. 18, 1994, at 2, 2.

⁸² 12 U.S.C. §§ 24(seventh), 92, 1843(c)(8).

into insurance markets will create conflicts of interest and thus increase the risk of systemic bank failure. Under pressure to raise their profitability, banking organizations have sought relief from these provisions by requesting the Comptroller to interpret them in light of modern banking needs. In the case of small-town insurance sales, such relief was provided by a 1986 OCC ruling granting small-town branches nationwide insurance agency powers.⁸³ However, this ruling was challenged as contravening the intent of Congress. The next section of this Note explores the arguments made by both the banking and insurance industries in two of the most recent cases to expressly and impliedly decide this issue: *Independent Insurance Agents of America, Inc. v. Ludwig* and *Variable Annuity Life Insurance Co. v. Clarke*.

III. DIVIDED WE STAND: THE CIRCUIT COURTS SPLIT ON BANKS' POWER TO SELL INSURANCE

A. Independent Insurance Agents of America, Inc. v. Ludwig

On July 16, 1993, the U.S. Court of Appeals for the D.C. Circuit issued an opinion upholding a ruling by the Comptroller of the Currency that permitted a national bank to sell general insurance products nationwide from a branch office located in a small town. This case, *Independent Insurance Agents of America, Inc. v. Ludwig*,⁸⁴ commenced in 1986 with a challenge by the insurance industry of an OCC opinion authorizing the United States Bank of Oregon, pursuant to section 92, to engage in general insurance activities from its small-town branch in Banks, Oregon (population 489) without geographic restrictions.⁸⁵ The district court upheld the OCC decision,⁸⁶ but the D.C. Circuit Court reversed on the grounds that section 92, the statutory provision underlying the OCC opinion, had been inadvertently repealed in 1918 by the misplacement of quotation marks in the statutory text and thus was not a legal basis for the OCC opinion.⁸⁷ This decision resulted in an appeal to the Supreme Court, which on June 7, 1993 held that the statute was not repealed

⁸³ OCC Interpretive Letter No. 366, *supra* note 43.

⁸⁴ 997 F.2d 958 (D.C. Cir. 1993).

⁸⁵ *Id.* at 959.

⁸⁶ *National Ass'n of Life Underwriters v. Clarke*, 736 F. Supp. 1162 (D.D.C. 1990) (granting the defendant's motions for summary judgment), *rev'd*, *Independent Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *rev'd sub nom.* *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173 (1993).

⁸⁷ *Independent Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992), *rev'd sub nom.* *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173 (1993).

and remanded the case for a decision on the merits.⁸⁸

On remand, the same judge who wrote the unusual "quotation marks opinion" striking down the OCC ruling came out in favor of the OCC. Judge Buckley, writing for a unanimous court, declared that judicial deference was to be paid to the Comptroller's opinion unless it is "so inconsistent" with a 'sufficiently clear' statutory policy as to demonstrate that 'Congress' clear intent has been violated."⁸⁹ Accordingly, the court found that because no unambiguous contrary intent had been expressed by Congress and because the OCC interpretation represented a permissible construction of the statute, the OCC ruling must be upheld.⁹⁰

Insurance advocates criticize the D.C. Circuit Court's opinion for failing to adequately consider the legislative history and purpose behind section 92. They suggest that a more exacting analysis of the issue would have revealed that Congress's decision to grant minimal insurance powers to national banks in small towns was done to give struggling banks "additional sources of revenue and [to] place them in a position where they could better compete with local State banks and trust companies."⁹¹ Thus, they conclude that Congress meant to create a limited opportunity for fledgling small-town banks only.⁹²

The insurance industry appellants in *Independent Insurance Agents* also put forth two arguments based on the 1982 amendment to the Bank Holding Company Act (BHCA), which allows any subsidiary of a bank holding

⁸⁸ *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2186-87 (1993). Justice Souter delivered the opinion of the Court, stating,

Against the overwhelming evidence from the structure, language, and subject matter of the 1916 Act there stands only the evidence from the Act's punctuation, too weak to trump the rest. In this unusual case, we are convinced that the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design. Courts, we have said, should "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute." The true meaning of the 1916 Act is clear beyond question, and so we repunctuate.

Id. at 2186 (citation omitted).

⁸⁹ *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993) (citing *Investment Co. Inst. v. Conover*, 790 F.2d 925, 935 (D.C. Cir.), *cert. denied*, 479 U.S. 939 (1986)).

⁹⁰ *Id.* at 962.

⁹¹ 53 CONG. REC. 11,001 (1916) (letter from then-Comptroller, J. Skelton Williams, to the Chairman of the Senate Banking and Currency Committee).

⁹² See *Independent Ins. Agents*, 997 F.2d at 960-61.

company to sell insurance in communities with populations of 5000 or fewer.⁹³ First, they argued that the 1982 amendment illuminates the intent of Congress, thus rendering the statutory language of section 92 unambiguous and not subject to the OCC's interpretation.⁹⁴ The court of appeals rejected this argument, noting that "[t]he two provisions were enacted over sixty-five years apart and deal with different types of banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies."⁹⁵ The court went on to state that "an act of Congress in 1982 can shed no light on the intent of Congress in 1916."⁹⁶ Contrary to the court's opinion, the Garn-St Germain Act was a renewed attempt to limit the incursion of banks into the insurance business.⁹⁷ Because of geographic options and available capital, BHCs could become even greater competitors to insurance agents than are national banks, if allowed to provide nationwide insurance services from small-town bases.

Appellants' second argument in *Independent Insurance Agents* was that the Comptroller should have considered the BHCA amendment in deciding whether to grant the National Bank of Oregon's request to sell insurance nationwide from its small-town branches.⁹⁸ The court of appeals rejected this argument as well, concluding that because the Comptroller's authority is derived solely from the National Bank Act, it was not mandatory for the Comptroller to consider issues under the BHCA or its amendments.⁹⁹ The D.C. Circuit's finding that section 92 was sufficiently ambiguous to uphold the Comptroller's interpretation was tacitly challenged a month later by the Fifth Circuit in *Variable Annuity Life Insurance Co. v. Clarke*.

B. Variable Annuity Life Insurance Co. v. Clarke

The United States Court of Appeals for the Fifth Circuit decided the case of *Variable Annuity Life Insurance Co. v. Clarke*¹⁰⁰ (*VALIC*) on August 26, 1993, calling into question the meaning of section 92 as it is affected by section 24.¹⁰¹ The facts of this case presented a different slant to the much litigated

⁹³ See 12 U.S.C. § 1843(c)(8)(C) (1988).

⁹⁴ *Independent Ins. Agents*, 997 F.2d at 962.

⁹⁵ *Id.* (quoting trial court).

⁹⁶ *Id.*

⁹⁷ See Fischer, *supra* note 17, at 789; Abbott et al., *supra* note 18, at 1007.

⁹⁸ *Independent Ins. Agents*, 997 F.2d at 962.

⁹⁹ *Id.*

¹⁰⁰ 998 F.2d 1295 (1993), *cert. granted sub nom. Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994).

¹⁰¹ *Id.* at 1296.

issue of bank insurance powers under section 92. Of concern in *VALIC* was the sale of annuities by national banks. As a threshold issue, the court characterized annuities as insurance within the meaning of section 92,¹⁰² thus banning their sale by banks except in communities of 5000 or fewer. The court then went on to hold that section 92, which permits national banks to act as insurance agents in towns with fewer than 5000 inhabitants, prohibits national banks from selling insurance products in towns with populations greater than 5000.¹⁰³ Lastly, the court found that the specific prohibition of bank insurance activities in section 92 controlled over the general grant of incidental powers in section 24.¹⁰⁴

After determining that annuities were insurance, the court attempted to revitalize the 1968 Fifth Circuit decision in *Saxon v. Georgia Ass'n of Independent Insurance Agents*,¹⁰⁵ which declared unlawful an OCC ruling allowing a national bank to sell insurance in cities of over 5000 people.¹⁰⁶ *Saxon* has been accorded little precedential weight by other courts since *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁰⁷ in which the Supreme Court announced a two-step analysis for review of administrative agencies' statutory interpretations.¹⁰⁸ The Fifth Circuit nonetheless relied on its earlier decision to reach the conclusion that Congress's intent with regard to section 92 is unambiguous and as such requires a narrow interpretation of section 24(seventh), the incidental powers provision.¹⁰⁹ The *VALIC* court adopted the view of the Second Circuit in *American Land Title Ass'n v. Clarke*¹¹⁰ "that the 'maxim *expressio unius est exclusio* [sic] *alterius* [the mention of one thing implies the exclusion of another], used as an aid to construction, leads to the conclusion that Congress intended to prohibit national banks located and doing business in towns with over 5,000 inhabitants from engaging in the insurance agency business."¹¹¹ The *VALIC* court further reasoned that if Congress had not intended to limit the grant of authority in

¹⁰² *Id.* at 1300. "Annuities have historically been considered insurance products because functionally they are the mirror image of life insurance." *Id.* at 1301.

¹⁰³ *Id.* at 1298.

¹⁰⁴ *Id.* at 1302. "[I]t is a basic principle of statutory construction that 'where two statutes conflict, the statute that addresses the matter under consideration in specific terms controls over the one that does so in a general manner.'" *Id.* (citing *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 157 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993)).

¹⁰⁵ 399 F.2d 1010 (5th Cir. 1968).

¹⁰⁶ *Id.* at 1012.

¹⁰⁷ 467 U.S. 837 (1984). See *supra* note 6.

¹⁰⁸ Whiting, *supra* note 66, at 14.

¹⁰⁹ *VALIC*, 998 F.2d at 1298-99.

¹¹⁰ 968 F.2d 150 (2d Cir. 1992).

¹¹¹ *VALIC*, 998 F.2d at 1298 (quoting *American Land Title Ass'n*, 968 F.2d at 155).

section 92 to national banks in locations with under 5000 inhabitants, it never would have inserted the restriction on the size of the community.¹¹²

The effect of the *VALIC* decision is to constrain the discretion of the OCC in allowing national banks to adjust incrementally to changing competitive and technological developments in the insurance field. However, the court did suggest a potential remedy for banking organizations:

We end our opinion by giving banks seeking more power than they are currently granted under §§ 92 and 24(7) the same advice given by Judge Homer Thornberry at the conclusion of his concurring opinion in *Saxon*: "banks should look to Congress, not the Comptroller." To Judge Thornberry's admonition we simply add, "... or the courts."¹¹³

IV. COMPARISON OF *INDEPENDENT INSURANCE AGENTS OF AMERICA, INC. v. LUDWIG* AND *VARIABLE ANNUITY LIFE INSURANCE CO. v. CLARKE*

Although the D.C. Circuit's opinion in *Independent Insurance Agents of America, Inc. v. Ludwig*¹¹⁴ and the Fifth Circuit's opinion in *Variable Annuity Life Insurance Co. v. Clarke*¹¹⁵ (*VALIC*) appear to present contrary analyses, the two decisions are technically not in direct conflict.¹¹⁶ *Independent Insurance Agents* concerned the sale of insurance from towns with fewer than 5000 inhabitants, whereas *VALIC* involved the ability of national banks to sell insurance anywhere.¹¹⁷ However, in practical application the two decisions are inconsistent.

In *VALIC*, the Fifth Circuit found that annuities are insurance products and as such are subject to section 92's geographic restriction.¹¹⁸ The D.C. Circuit's ruling in *Independent Insurance Agents*, which "upheld a ruling of the Comptroller that national banks may sell any type of insurance—including annuities—nationwide from small towns . . . could nullify the adverse effect of the Fifth Circuit decision."¹¹⁹ The practical effect is that banks previously

¹¹² *Id.* However, it can be argued that the general grant of insurance powers to banks under § 92 increases, not curtails, the authority of banks under § 24's "incidental to banking" clause.

¹¹³ *Id.* at 1303 (citation omitted).

¹¹⁴ 997 F.2d 958 (D.C. Cir. 1993).

¹¹⁵ 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.* Ludwig v. Variable Annuity Life Ins. Co., 114 S. Ct. 2161 (1994).

¹¹⁶ Fein, *supra* note 54, at 4.

¹¹⁷ *Id.*

¹¹⁸ *VALIC*, 998 F.2d at 1301.

¹¹⁹ Fein, *supra* note 54, at 4.

unable to sell insurance nationwide as incidental to their banking business¹²⁰ pursuant to *VALIC* can now do so by establishing a branch bank in a community with a population of 5000 or fewer.

The following analysis first considers the ambiguity of the statutes and congressional intent, then evaluates the permissibility of the OCC rulings.¹²¹

A. Section 92

Congressional intent is often determined by looking to the legislative history of the provisions in question,¹²² but the courts of appeals are split as to how to read the legislative history of section 92. Consequently, the process of ascertaining whether there is ambiguity in this section is best accomplished by reading section 92 together with sections 24(seventh) and 1843(c)(8). A comparison of these provisions allows us to draw inferences about congressional intent.

Section 92 provides in pertinent part that "national banking associations . . . located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may . . . act as the agent for any fire, life or other insurance company."¹²³ The first question to ask with regard to the D.C. Circuit's decision in *Independent Insurance Agents* is whether the small-town restriction means only that a bank must be located in a place with a population of under 5000 in order to sell insurance,¹²⁴ or whether that restriction also requires that the insurance be confined to that area. If the former is the proper interpretation, then nationwide insurance sales from small-town branches would be permissible. This is the conclusion reached by the D.C. Circuit in *Independent Insurance Agents*.

Because the language of section 92 is unclear, it is useful to look at section 1843(c)(8)(C), the only other provision to introduce the small-town limitation. Section 1843(c)(8)(C) explicitly limits the geographic scope of insurance activities by BHCs and their nonbank subsidiaries to communities of 5000 or fewer. Insurance advocates herald this as an indication that Congress intended

¹²⁰ The issue in *VALIC* was whether the Comptroller had properly interpreted the incidental powers clause in § 24(seventh) to allow national banks to sell fixed and variable annuities in light of the express grant of bank insurance powers in § 92.

¹²¹ This is the two-step analysis employed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹²² See *supra* notes 48-52 and accompanying text.

¹²³ 12 U.S.C. § 92 (Supp. V 1993) (emphasis added).

¹²⁴ The implication of this interpretation would be to allow big-city branches to act as insurance agents for their small-town branches as long as the activity is conducted out of the small-town branch.

section 92 to also limit national bank insurance powers to the same extent.¹²⁵ There are two reasons why this analogy cannot and should not be drawn. First, there is a sixty-six year time span between the enactments of section 92 and section 1843(c)(8)(C), thus precluding any possibility of a nexus between congressional intent in 1916 and congressional intent in 1982.¹²⁶ Second, BHCs are subject to oversight by the Federal Reserve Board and not the Office of the Comptroller of the Currency. Thus, because national banks and BHCs derive their authority from two different statutory sources and are not subject to the same oversight, the analogy is faulty and cannot be used to prove that section 92 limits national bank insurance powers.¹²⁷

There has been no word from Congress regarding the interpretation of section 92 since its enactment in 1916. If one adopts a "silence as acceptance" theory, it would appear that Congress is content with the interpretation given this provision by the OCC and upheld by the D.C. Circuit in *Independent Insurance Agents*. During the past twenty-five years section 92 has been read more and more broadly by the OCC in an effort to help banks keep up with the times.¹²⁸ Frequent challenges by the insurance industry have resulted in gains and losses for both the insurance and banking industries.¹²⁹ While Congress has apparently been dissatisfied with rulings of both the OCC and the courts,¹³⁰ it has accomplished little to clarify the situation.¹³¹ The absence of such resolve indicates Congress's general contentment with the status quo. The unavoidable conclusion is that the D.C. Circuit Court was correct to defer to the Comptroller's ruling allowing nationwide insurance sales from branches in small towns. The Comptroller's ruling was not an impermissible construction of the statute.¹³²

B. Section 24(seventh)

With the allowance of nationwide bank insurance sales from small-town

¹²⁵ See, e.g., Abbott et al., *supra* note 18, at 1023; *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993).

¹²⁶ *Independent Ins. Agents*, 997 F.2d at 962.

¹²⁷ *Id.*

¹²⁸ See *supra* notes 42-44 and accompanying text.

¹²⁹ This point is well illustrated by the divergent results in *VALIC* and *Independent Insurance Agents*.

¹³⁰ See *Revised Senate Bank Insurance Powers and Interstate Branching Bill Could Move*, *supra* note 76.

¹³¹ See Garsson, *supra* note 76.

¹³² See *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993).

branches under section 92, the debate over product expansion pursuant to section 24(seventh) is fading fast. Nonetheless, an exploration of this debate is warranted because the Supreme Court has yet to rule on section 92's small-town clause, and it is possible that other circuits would decide the issue differently.

Interpretation of the incidental powers clause in section 24(seventh), as it relates to section 92, raises the question of whether insurance powers can be implicitly derived from section 24. This issue was most recently dealt with in *VALIC*. Of concern in *VALIC* was a decision by the Comptroller to allow national banks to sell fixed and variable annuities as incidental to the business of banking under section 24(seventh). The Comptroller's ruling stated that "variable annuities bear a resemblance to mutual funds and can be viewed as purely an investment vehicle."¹³³ The Comptroller later declared that annuities are essentially financial investments that entail investment risk rather than insurance risk.¹³⁴ Despite the Comptroller's characterization of annuities as incidental to banking, the Fifth Circuit in *VALIC* found that annuities are insurance products and thus subject to the restrictions of section 92.¹³⁵

The Fifth Circuit's finding can be criticized for failing to adequately consider the arguments put forth by the Comptroller in support of using the incidental powers clause.¹³⁶ The Fifth Circuit's presumption of a clear congressional intent with respect to section 92 led it to hastily discount the otherwise meritorious arguments of the Comptroller. The ambiguity in dispute here refers to the types of insurance covered by section 92. The court concluded that the section clearly referred to all insurance not necessary to carry on the business of banking.¹³⁷ However, the Comptroller made a legitimate argument that even if annuities are insurance, they are not the type of insurance to which section 92 refers. The argument is that annuities contracts, unlike general insurance, are a specialized insurance product. Section 92 expressly covers "fire, life, and other insurance,"¹³⁸ leading one to reasonably

¹³³ OCC Interpretive Letter No. 331, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (Apr. 4, 1985).

¹³⁴ OCC Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (Feb. 12, 1990).

¹³⁵ *VALIC*, 998 F.2d at 1295.

¹³⁶ Fein, *supra* note 54, at 5.

¹³⁷ The Fifth Circuit attempted to distinguish the allowance of credit life insurance sales by banks in *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), as necessary to protect the lender's interest by ensuring that a loan will be repaid even if a borrower dies. *VALIC*, 998 F.2d at 1302. Despite the court's acknowledgement of this exception, the analysis adopted by the court would make questionable many national bank activities long considered to be permissible.

¹³⁸ 12 U.S.C. § 92 (Supp. V 1993).

conclude that only broad forms of insurance similar to these fall under section 92. Because the language of the statute is ambiguous, interpretations such as this one need only be reasonable to be upheld.

A final argument made in support of bank insurance powers focuses solely on section 24(seventh), which purports to grant national banks "all such incidental powers as shall be necessary to carry on the business of banking."¹³⁹ The Fifth Circuit in *VALIC* failed to analyze in any depth the scope of the incidental powers clause as it relates to the possible sale of annuities.¹⁴⁰ Instead, the court focused on the existence of section 92 as a limitation to section 24(seventh).¹⁴¹ In so doing, the court adopted a narrow interpretation of the incidental powers clause thought to have been cast aside by the courts over twenty years ago.¹⁴² Prior to the *VALIC* decision, the incidental powers clause was construed to include activities that were "convenient or useful" in connection with the performance of a bank's established activities pursuant to its express powers.¹⁴³ The First Circuit in 1972 addressed this issue in *Arnold Tours, Inc. v. Camp*, stating,

In our opinion, . . . a national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. § 24, Seventh, if it is convenient or useful in connection with the

¹³⁹ 12 U.S.C. § 24(seventh) (1988 & Supp. V 1993).

¹⁴⁰ Fein, *supra* note 54, at 5.

¹⁴¹ *Id.*

¹⁴² *Id.*; see *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972) (interpreting the "incidental" language in § 24(seventh) narrowly by tying incidental powers to express powers and those powers convenient and useful to carrying out the business of banking). *Contra* Independent Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1170 (D.C. Cir. 1979) (employing a broad approach to the interpretation of the "incidental" language of § 24(seventh) by looking at the "business of banking" as opposed to the express powers enumerated in that provision), *cert. denied*, 449 U.S. 823 (1980). In *American Insurance Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988), responding to appellant's argument that a bank may engage only in those activities specifically mentioned and others incident (i.e., convenient or useful) to the expressly authorized activities in § 24(seventh), the court found that this argument reflected "a narrow and artificially rigid view of both the business of banking and the [NBA]." *Id.* at 281 (citation omitted). In *Securities Industry Ass'n v. Clarke*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), the Comptroller espoused a more flexible standard, arguing that the *Arnold Tours* test is unnecessarily restrictive of the powers of national banks. *Id.* at 1048. The court agreed that the proper test was no more restrictive than *Arnold Tours* and found that activities within the bank's "incidental powers"—powers that are "convenient [and] useful" to the business of banking—are proper exercises of the bank's powers under the National Bank Act. *Id.* at 1049.

¹⁴³ *Arnold Tours*, 472 F.2d at 431.

performance of one of the bank's *established activities* pursuant to its express powers under the National Bank Act.¹⁴⁴

The *VALIC* court did not acknowledge the *Arnold Tours* precedent but instead set out to interpret "necessary" narrowly.¹⁴⁵ The Fifth Circuit's limiting construction of the word appears to be motivated by a desire to confine the types of activities falling under section 24(seventh) to those considered by Congress to be part of the business of banking when the National Bank Act was first enacted in 1864.¹⁴⁶ The problem with this interpretation is that the "business of banking" is very different today than it was 130 years ago.

Like sales of credit life insurance, annuities sales are specialized insurance activities convenient and useful in the conduct of the ordinary business of banking. Attempts to distinguish these activities are little more than exercises in hair-splitting and should be avoided if there is to be any coherency in the law of bank insurance powers.

V. CONCLUSION

The Supreme Court's decision to review *VALIC*¹⁴⁷ provides the only hope for any immediate resolution of these issues.¹⁴⁸ As one commentator recently put it, "The Supreme Court will have before it in the *Valic* case the chance to wipe off the map many rules hampering banks from selling insurance-related products."¹⁴⁹ A ruling in this case will also implicitly decide the issues regarding section 92 present in *Independent Insurance Agents*. Pending such a determination by the Supreme Court, no congressional action can be expected.¹⁵⁰

¹⁴⁴ *Id.* at 432 (emphasis added).

¹⁴⁵ Fein, *supra* note 54, at 5.

¹⁴⁶ See *VALIC*, 998 F.2d at 1303. "If § 24(7) had authorized banks to sell insurance products, Congress would not have needed to add § 92 which grants national banks the limited power to sell insurance in towns with less than 5,000 inhabitants." *Id.* This theory, however, is overshadowed by the fact that § 92 gave broad, general powers quite apart from those incidental to the "business of banking."

¹⁴⁷ *Ludwig v. Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994), *granting cert. to Variable Life Annuity Ins. Co. v. Clarke*, 998 F.2d 1295 (5th Cir. 1993)).

¹⁴⁸ There has been no attempt to seek review by the Supreme Court of *Independent Insurance Agents*.

¹⁴⁹ *Decision Has Risk for Bankers: SG To Back Banks, OCC in Seeking Valic Review*, *supra* note 82, at 1.

¹⁵⁰ *Dodd Decision on Bill Helps Banks*, *BANKING ATT'Y*, Feb. 14, 1994, at 7.

Bank sales of uninsurable products such as mutual funds and annuities will get a

The method of analysis that should be employed by the Court in addressing the issues of scope with regard to sections 24(seventh) and 92 is the two-step analysis put forth by the Court in *Chevron*.¹⁵¹ Because courts have interpreted the permissible scope of these provisions differently, there should be a presumption of ambiguity, or lack of clear congressional intent. Consequently, the only issue left for the Court to determine is whether the OCC rulings in question are permissible constructions of sections 24(seventh) and 92. If it cannot be found that the Comptroller's interpretation was permissible, then the Court must give deference to his expertise and sustain his rulings. The unavoidable conclusion in both *VALIC* and *Independent Insurance Agents* is that the Comptroller did not give the provisions impermissible constructions.

Beyond the concerns for paying deference to decisions made by administrative agencies, there are several policy reasons that also support the aforementioned conclusion. First, Congress has been aware of the bank insurance powers debate and has failed to act decisively to clear up ambiguities in the law. Thus, one may reasonably draw the conclusion that broad interpretation of sections 24(seventh) and 92 by the OCC are not only sanctioned by Congress but desired. Allowing the OCC to interpret these provisions in a reasonable fashion helps to alleviate the burden on Congress to modernize the laws. Second, as a practical matter, a decision reversing the Comptroller's rulings would create many problems for national banks currently engaged in insurance activities, in particular the sale of annuities. Over the years an intricate balance has developed between the banking and insurance

boost from the decision of Sen. Christopher J. Dodd, D-Conn., to drop support of legislation sought by the insurance agents industry that would have effectively removed banks as strong competitors in sales of insurance products.

....

Dodd's "abrupt decision leaves the controversy of the statutory authority of banks to sell annuities and insurance products up to the courts at this time," said David W. Roderer, of Winston & Strawn in Washington.

Roderer said he believed one factor in Dodd's decision was the "strongly worded" dissent by four judges of the 5th U.S. Circuit Court of Appeals to the court's decision not to review its ruling *Valic vs. Clarke, et al.*, 92-2010, a ruling that held that Section 92 of the National Bank Act was the sole source of national bank insurance powers.

Id. Now that the Supreme Court has granted certiorari to the *VALIC* case, the federal regulators are "arguably relieved . . . of their previously perceived need to clarify the status of annuities for the federal banking statutes." *Id.*

¹⁵¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-47 (1984) (forbidding a court to substitute its own interpretation of a statutory provision for one made by a regulatory agency if Congress has not directly addressed the specific issue).

industries, and a decision to strike down the OCC rulings would destroy this balance. Such a prospect would be a major setback for the banking industry in its quest for authority to sell more products.

In the end, there can be but one conclusion: Until Congress speaks to the contrary, the Comptroller has the authority to interpret sections 24(seventh) and 92 as he deems "necessary to carry on the business of banking,"¹⁵² so long as his interpretation is not impermissible. Because the National Bank Act does not define insurance, the job of arriving at a reasonable interpretation of insurance falls to the regulator of the industry in question, the OCC. In keeping with this duty, the Comptroller has characterized annuities as investment products and not insurance. In addition, the scope of those annuities sales is also subject to interpretation by the OCC. Accordingly, the Comptroller has determined that section 92 permits nationwide sales of insurance by national banks located in communities of 5000 people or fewer. Because neither ruling controverts the unambiguous expressed intent of Congress, these permissible constructions of sections 24(seventh) and 92 must be upheld.

¹⁵² See *supra* notes 53-60 and accompanying text.